

A **Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors**

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-41-94
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN FCJ AND

B ABU MANSOR JCA
14 DECEMBER 1996

Civil Procedure — *Functus officio* — *Application to set aside order for sale of land* — *Whether court could set aside order after order was made, drawn up and perfected* — *Whether court was functus officio*

C *Land Law* — *Charge* — *Order for sale* — *Order perfected* — *Application by chargor to set aside order* — *Whether order may be set aside by court* — *Whether court was functus officio*

D *Civil Procedure* — *Res judicata* — *Decision, finality of earlier decision* — *Order drawn up and perfected* — *No appeal* — *Application to set aside order on ground that court had no jurisdiction to make order* — *Issue not raised in earlier hearing* — *Whether court could reopen matter* — *Whether matter res judicata*

E The appellant, the chargee of a piece of land held under land office title ('the land'), applied by originating summons to the High Court for an order of sale of the land which was owned and charged by the respondents in favour of the appellant. The originating summons was heard inter parties in chambers, and an order of sale was made by the judge ('the first order'). The first order was subsequently perfected, and no appeal was filed by either party against the first order. About nine months later, the respondents filed a summons in chambers in the same court for an order that the first order be set aside, and a point of jurisdiction was raised for the first time that the High Court had no jurisdiction to make the first order, and that such an order should have been made by the land administrator in pursuance of the provisions of the National Land Code 1965. The judge after hearing the parties, ordered that the first order be set aside ('the second order'). The appellant appealed. The issues before the court were: (i) the revocability by another judge subsequently of an order made by an earlier judge and since perfected; and (ii) the actual stages of a case where an objection on the point of jurisdiction of the court could be raised.

H **Held**, allowing the appeal:

I An order of sale of charged land was a final order unless appealed against and once it was made, drawn up and perfected, the judge was functus officio and therefore had no power to set aside the order of sale. Thus, the judge in the court below had no power to hear the application to set aside and make the second order (see p 108H-I); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 followed and *Muniandy all Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 distinguished.

To allow the judge in the court below to reopen the matter nine months after it was decided by himself would bring absolute chaos to the judicial system. A jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it could not be raised thereafter, for the doctrine of *res judicata* sets in (see p 110D-F); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 and *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed and *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 distinguished.

[Bahasa Malaysia summary]

Perayu, iaitu pemegang gadaian sebidang tanah yang dipegang di bawah hakmilik pejabat tanah ('tanah tersebut'), memohon melalui saman pemula kepada Mahkamah Tinggi untuk perintah jualan tanah tersebut yang dimiliki dan digadaikan oleh penentang-penentang kepada perayu. Saman pemula itu dibicarakan secara *inter parties* dalam kamar, dan perintah jualan telah dibuat oleh hakim ('perintah pertama'). Perintah pertama kemudiannya disempurnakan, dan tidak ada rayuan difailkan oleh mana-mana pihak terhadap perintah pertama. Kira-kira sembilan bulan kemudian, penentang-penentang memfailkan saman dalam kamar di mahkamah yang sama untuk perintah supaya perintah pertama diketepikan, dan suatu perkara bidang kuasa ditimbulkan buat pertama kali bahawa Mahkamah Tinggi tidak mempunyai bidang kuasa untuk membuat perintah pertama, dan bahawa perintah sedemikian sepatutnya dibuat oleh pentadbir tanah mengikut peruntukan-peruntukan Kanun Tanah Negara 1965. Hakim, setelah mendengar pihak-pihak, memerintahkan bahawa perintah pertama diketepikan ('perintah kedua'). Perayu membuat rayuan. Isu yang harus dipertimbangkan oleh mahkamah adalah: (i) pembatalan kemudian suatu perintah yang dibuat oleh hakim yang terdahulu dan telah disempurnakan oleh seorang hakim lain; dan (ii) peringkat sebenar sesuatu kes di mana suatu bantahan atas perkara bidang kuasa mahkamah boleh ditimbulkan.

Diputuskan, membenarkan rayuan:

Suatu perintah jualan tanah yang digadaikan adalah perintah muktamad kecuali ianya dibuat rayuan dan apabila ianya dibuat, ditulis dan disempurnakan, hakim adalah *functus officio* dan oleh itu tidak mempunyai kuasa untuk mengetepikan perintah jualan. Justeru itu, hakim di mahkamah bawah tidak mempunyai kuasa untuk mendengar permohonan untuk mengetepikan dan membuat perintah kedua (lihat ms 108H-I); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 diikuti dan *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 dibeza.

Dengan membenarkan hakim di mahkamah bawah membuka semula perkara itu sembilan bulan selepas ia diputuskan oleh beliau

- A sendiri akan menyebabkan keadaan kelam kabut dalam sistem kehakiman. Perkara bidang kuasa tidak kurang pentingnya daripada isu-isu yang lain dalam litigasi sivil. Jika tidak ditimbulkan di pembicaraan di mahkamah pertama atau atas rayuan, ia tidak boleh ditimbulkan kemudiannya, kerana doktrin res judicata telah timbul
- B (lihat ms 110D-F); *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 dan *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikuti dan *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 dibeza.]

Notes

- C For cases on functus officio, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1409-1412.
For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892-2939.
For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471-1500.
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Cases referred to

- Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (folld)
- E *Harrison's Settlement, Re* [1955] 1 All ER 185 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Issacs v Robertson [1984] 3 All ER 140 (refd)
MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (folld)
- F *Muniandy a/l Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 (distd)
Oversea-Chinese Banking Corp Ltd v Sindoma Realty Sdn Bhd and another application [1989] 1 MLJ 377 (refd)
Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener) and another appeal [1994] 2 MLJ 601 (refd)
- G *Sykt Marak Jaya Sdn Bhd v Sykt Masinda Sdn Bhd* [1991] 2 MLJ 417 (refd)
Tan Teng Pan v Wong Fook Shang [1973] 1 MLJ 31 (refd)
United Asian Bank Bhd v Elgi Marka Sdn Bhd [1995] 1 MLJ 301 (refd)

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Legislation referred to

Evidence Act 1950 s 114(e)
Rules of the High Court 1980 O 28 r 4(1)

I

Appeal from: Civil Suit No F31-92-1986 (High Court, Kuala Lumpur)

Teh Tse Yee (TY Teh & Partners) for the appellant.
M Segaram (Sykt M Segaram) for the respondents.

Cur Adv Vult A

Peh Swee Chin FCJ (delivering the judgment of the court): This appeal brings to light, once more, two familiar questions but in somewhat different circumstances. The first of these questions is the revocability by another judge subsequently of an order made by an earlier judge and since perfected, and the other question is as to the actual stages of a case where an objection on the point of jurisdiction of the court can be raised by a defendant. B

A brief history of the case will be necessary to show how these two questions have arisen.

The appellant, the chargee of a piece of land held under land office title ('the land'), applied by originating summons to the High Court for an order of sale of the land which was owned and charged by the respondents ('the chargors'), in favour of the appellant ('the chargee'). It will have been noticed that the land administrator of the district in which the land is situated would have been the proper authority to hear the application for an order of sale of the charged land held under a land office title. C D

The originating summons concerned in this appeal was duly fixed for hearing and it came up for a contested hearing inter parties in chambers on 3 September 1991, more specifically, in the presence of counsel for both parties and an order of sale with consequential directions was made on the same day by the learned judge ('the first order'). E

The first order was subsequently extracted or perfected and no appeal was filed by either party against the said order within the time provided for such appeal.

Apparently, the chargors later had a 'brain wave' and filed a summons in chambers dated 8 June 1992, ie about nine months later, in the same court for an order that the first order be set aside, and — as is evident from the affidavit of Chu Akau @ Chooi Ah Kow affirmed on 8 June 1992 — on a point of jurisdiction raised for the first time that the High Court had no jurisdiction to make the first order, and that such an order should have been made by the land administrator in pursuance of the provisions of the National Land Code 1965. The court (in fact incidentally, the same learned judge who made the first order), after hearing the parties on 17 September 1992, set aside the first order on 17 September 1992 ('the second order'). Hence this appeal before us by the chargee. F G

Before us, it was argued for the chargee, relying in particular, on a judgment of the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 to the effect that an order of sale of charged land was a final order unless appealed against and once it was made, drawn up and perfected, the learned judge was functus officio and therefore had no power to set aside the order of sale. Thus, going by the judgment, the learned judge in the court below had no power to hear and make the second order. H I

It was argued on behalf of the chargors that the learned judge had power to set aside the first order even though it was perfected, and another

- A judgment of the Supreme Court in *Muniandy all Thamba Kaundan & Anor v D & C Bank Bhd & Anor* [1996] 1 MLJ 374 was cited in support.

The ratio of *MUI Bank* is more familiar and well-settled, and it is in fact supported by a number of authorities, including *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143 (FC), *Oversea-Chinese Banking Corp Ltd v Sindoma Realty Sdn Bhd and other applications* [1989] 1 MLJ 377, *Sykt Marak Jaya Sdn Bhd v Sykt Masinda Sdn Bhd* [1991] 2 MLJ 417 and a host of others.

- C We look into *Muniandy*. There, an order of sale of charged land was also involved and the chargor applied to set it aside for which *MUI Bank's* case was cited in opposition. The Supreme Court found that *MUI Bank's* ratio was subject to certain exceptions, and one of the exceptions applied, ie that the Supreme Court found the order of sale therein to be a nullity for non-service of notice of adjourned hearing on the chargors, as the order of sale was an ex parte order made in the absence of the chargors, where the application for it was heard ex parte. The Supreme Court held (at pp 381–382) that the judge in such circumstances of non-service was not functus officio and he could set the order aside in the exercise of its inherent jurisdiction on the ground that it was a nullity, and on the further ground that it was a breach of the rule of natural justice of being deprived of an opportunity of being heard.

- E With great respect, we are in agreement with both decisions of the Supreme Court, and we may add there is no conflict between them, and that the exercise of inherent jurisdiction in *Muniandy* is perhaps an alternative to O 28 r 4(1) of the Rules of the High Court 1980 ('the RHC') which seems to provide expressly for the situation arising in *Muniandy*:

- F The Court by whom an originating summons is heard may, if the liability of the defendant to the plaintiff in respect of any claim made by the plaintiff is established, make such order in favour of the plaintiff as the nature of the case may require, but where the Court makes an order under this paragraph against a defendant who does not appear at the hearing, the order may be varied or revoked by a subsequent order of the Court on such terms as it thinks just.

- G In the instant appeal, there is no question of any order made ex parte, for the order of sale was made after hearing counsel for both parties. The general rule about the non-revocability of a perfected order, subject to exceptions contained in the RHC, etc is still a formidable obstacle to the chargors herein unless the point of jurisdiction could be allowed to be raised at the stage when it was so raised.

- H On the point that the High Court had no jurisdiction to make an order of sale in the case of land held under a land office title, the point seems to be well founded: see *United Asian Bank Bhd v Elgi Marka Sdn Bhd* [1995] 1 MLJ 301 and *Tan Teng Pan v Wong Fook Shang* [1973] 1 MLJ 31.

I This point of jurisdiction can be raised on appeal, of course, and it goes without saying a fortiori it can be raised in a court of first instance. This point was raised before us, and it was in fact also raised before the

learned judge in the court below. However, in the circumstances of this case as set out below, one cannot yet say *cadit quaestio*. A

In so far as it was raised before the learned judge, it was not raised before the first order was made on 3 September 1991. The first order of sale, in fact, has never been appealed against.

It was raised in a subsequent summons in the same case as an afterthought, filed on 8 June 1992, thus offending the general rule stated in *MUI Bank's* case, and also not coming within the exception to such general rule as in *Muniandy*. B

We do not think it could be so raised and acted on by the judge. It could have, of course, been raised on appeal if an appeal was filed against the first order. Before such an appeal was filed and before the said order of sale was perfected, it could be also reviewed by the court in exercise of its inherent jurisdiction: see *Re Harrison's Settlement* [1955] 1 All ER 185 and *Sykt Marak Jaya*. C

To allow the learned judge in the court below to reopen the matter nine months after it was decided by himself (and for that matter, any other judge), a court would have to allow, equally, another judge exercising a co-ordinate jurisdiction to set it aside on the same jurisdiction point after, say, 20 years, in the same case, for food for a goose is also food for a gander. This would bring absolute chaos to our judicial system which does not carry on in such fanciful way as contended by learned counsel for the chargors. D

Such chaotic condition is prevented by several things.

First, a jurisdiction point is no less an issue than other issues in civil litigation. If not raised at the hearing in the court of first instance or on appeal, it cannot be raised thereafter, for the doctrine of *res judicata* sets in. E

Res judicata has been explained before, eg see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 (SC).

When the jurisdiction point in question was not raised before the learned judge before he made the first order, when he heard the matter inter parties, or at any rate, if it was not raised for review before the said order was perfected, the requirements of a proceeding in an adversarial system were complied with and satisfied, unless the learned judge exceptionally took the jurisdiction point on his own initiative, if he so minded, before the said order of sale was made. We mentioned the adversarial system because in it, a court generally would leave it to the parties in litigation to conduct their respective cases as best as they could without interference. G

It is to be remembered in this connection that a superior court like the High Court is 'a court of unlimited jurisdiction in the course of contentious litigation' as stated by Lord Diplock in *Issacs v Robertson* [1984] 3 All ER 140 at p 143, when referring to a High Court as such a court in connection with the requirement that a High Court's order must be obeyed and could only be challenged in a direct application to set it I

A aside. This was followed by the Supreme Court in *Puah Bee Hong & Anor v Pentadbir Tanah Daerah Wilayah Persekutuan Kuala Lumpur & Anor (Teo Keng Tuan Robert, Intervener)* and another appeal [1994] 2 MLJ 601 (SC).

B We may add that under s 114(e) of the Evidence Act 1950, one can presume that the High Court has such attributed jurisdiction unless rebutted. We say this in connection with our description of such a jurisdiction point as being ordinarily an issue in litigation.

C If the learned judge had no jurisdiction on 17 September 1992 to hear the application dated 8 June 1992 to set aside the first order, the application to set aside could not have been entertained by the court in the first place. Thus, any legal argument in support of such application to set aside — should it proceed — ex necessitate could not have been entertainable, lying, as it did, outside the threshold of the court.

D As a necessary consequence, this appeal is not properly before us — it being an appeal from an order made at a hearing which was an exercise in futility.

E We therefore allow the appeal, setting aside the second order of the court below dated 17 September 1992, with costs here and below to be paid by the chargors, viz the respondents. Deposit is to be paid to the appellant to account of costs.

E *Appeal allowed.*

Reported by Jafisah Jaafar

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